



City of Rockville

MEMORANDUM

March 26, 2009

TO: The Mayor and Council

FROM: Debra Yerg Daniel, City Attorney *DM*

SUBJECT: Closed Sessions

I. Introduction

At the February 23, 2009 meeting, you requested that I bring a discussion to the Mayor and Council on the legal requirements for entering into closed sessions. In particular, I was asked to look into the procedural requirements for the Mayor and Council to enter into closed sessions on the record. In addition, questions were raised regarding when (i.e., beginning, middle or end of scheduled meeting) and how (i.e., on or off air) the Mayor and Council needed to go into closed session. This memorandum will outline the procedural requirements as set forth in Maryland's Open Meetings Act and discuss possible guidelines for the Mayor and Council to adopt to govern its practice of entering into closed sessions.

II. Open Meetings Act and Closed Sessions

A. Background

The Open Meetings Act ("Act") was enacted to prescribe the balance between two important competing interests: 1) securing the public's right to know how its public bodies are conducting its business; and 2) preserving the confidentiality that is necessary to the "efficient, effective and fair conduct of government."¹ This Act applies to the Mayor and Council meetings when it convenes a quorum "for the consideration or transaction of public business."² All meetings that

¹ Open Meetings Act Manual, Sixth Edition, October 2006, Preface, p. iii. This Manual can be found on the Office of Attorney General's website at www.oag.state.md.us; click on "Open Government" link.

² Open Meetings Act, § 10-502(g), State Government Article of the Maryland State Annotated Code (2004). See Attachment B, Open Meetings Act §§ 10-501 through 10-512, *et. seq.*, State Government Article (2004), p. B-1. All citations hereafter will be to the State Government Article unless otherwise noted.

fall under the scope of the Act³ must be held in open session unless the substance of the meeting falls under one of the closed session exceptions set forth below.⁴

B. Closed Session Exceptions

Section 10-505 of the Act requires public bodies to meet in open session, except “as otherwise expressly provided” in the Act.⁵ Section 10-508(a) of the State Government Article sets forth 14 circumstances under which a public body may meet in closed session,⁶ including to:

- (1) discuss
 - (i) the appointment, employment, assignment, promotion, discipline, demotion, compensation, removal, resignation, or performance evaluation of appointees, employees, or officials over whom it has jurisdiction; or
 - (ii) any other personnel matter that affects 1 or more specific individuals;
- (2) protect the privacy or reputation of individuals with respect to a matter that is not related to public business;
- (3) consider the acquisition of real property for a public purpose and matters directly related thereto;

³ Certain matters of business do not fall under the scope of the Open Meetings Act as set forth in § 10-503 of the State Government Article (2004), which states, in full, as follows:

§10-503. Scope of subtitle.

(a) *Not applicable.*—Except as provided in subsection (b) of this section, this subtitle does not apply to:

(1) a public body when it is carrying out:

- (i) an executive function;
- (ii) a judicial function; or
- (iii) a quasi-judicial function; or

(2) a chance encounter, social gathering, or other occasion that is not intended to circumvent this subtitle.

(b) *Applicable.*—The provisions of this subtitle apply to a public body when it is meeting to consider:

- (1) granting a license or permit; or
- (2) a special exception, variance, conditional use, zoning classification, the enforcement of any zoning law or regulation, or any other zoning matter.

⁴ The Act also does not apply to electronic mail communications among the Mayor and Council, unless a quorum of the body “is engaged in a simultaneous exchange of e-mail on matter of public business.” 81 Op. Att’y Gen. 140, 140 (May 22, 1996). The Attorney General’s Office likened e-mail communication to the “circulation of written memoranda.” *Id.*, at 143. And concluded that that kind of exchange did not amount to convening “a quorum of a public body” and, therefore was not a “meeting” as defined under the Act. *Id.* If, however, the members of a public body were to use e-mail to effectuate a “real time” simultaneous exchange of information to discuss a matter of public business, the result would be more analogous to a telephone conference call which could constitute a “meeting” under the Act. *Id.*, at 144.

⁵ § 10-505, Attachment B, p. B-8.

⁶ § 10-508(a), Attachment B, p. B-9.

- (4) consider a matter that concerns the proposal for a business or industrial organization to locate, expand, or remain in the State;
- (5) consider the investment of public funds;
- (6) consider the marketing of public securities;
- (7) consult with counsel to obtain legal advice;
- (8) consult with staff, consultants, or other individuals about pending or potential litigation;
- (9) conduct collective bargaining negotiations or consider matters that relate to the negotiations;
- (10) discuss public security, if the public body determines that public discussion would constitute a risk to the public or to public security, including:
 - (i) the deployment of fire and police services and staff; and
 - (ii) the development and implementation of emergency plans;
- (11) prepare, administer, or grade a scholastic, licensing, or qualifying examination;
- (12) conduct or discuss an investigative proceeding on actual or possible criminal conduct;
- (13) comply with a specific constitutional, statutory, or judicially imposed requirement that prevents public disclosures about a particular proceeding or matter; or
- (14) before a contract is awarded or bids are opened, discuss a matter directly related to a negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process.

As noted in the Open Meetings Act Manual, the circumstances provided for in § 10-508(a) either 1) recognize that other law might require that a meeting be closed;⁷ 2) are designed to protect the privacy of individuals;⁸ or 3) “are intended to protect the public interest by allowing a body to discuss genuinely sensitive issues in closed session.”⁹

C. Procedural Requirements for Entering Into Closed Sessions

Section 10-508(d) sets forth the procedural requirements for entering into a closed session. Specifically, prior to entering into a closed session, the presiding officer, in this case, the Mayor, must 1) conduct a recorded vote with a majority of the members voting in favor of going into the closed session;¹⁰ and 2) make a written statement of the reason for closing the meeting, including

⁷ Open Meetings Act Manual, p. 29; § 10-508(a)(13), Attachment B, p. B-9. See footnote 1.

⁸ *Id.*, at 29; §§ 10-508(a)(1) and (2), Attachment B, p. B-9.

⁹ *Id.*, at 30.

¹⁰ If a majority of the members do not vote in favor of going into closed session, the public body may not meet in closed session. § 10-508(d), Attachment B, p. B-10.

a citation of the authority for going into closed session and a list of the topics to be discussed.¹¹ The Act further provides that a public body that meets in closed session may not discuss or act on any matter not permitted under the closed session exceptions¹² and that the closed session exceptions are to be strictly construed in favor of open meetings.¹³

In addition, the Act sets forth requirements for noticing of the closed sessions as well as what needs to be included in the minutes. With respect to notice, the Act's requirements are the same for both open sessions and closed sessions. The Act requires "reasonable advance notice" and provides that "[w]henver reasonable" notice shall "1) be in writing; 2) include the date, time, and place of the session; and 3) if appropriate, include a statement that a part or all of a meeting may be conducted in closed session."¹⁴ The Act sets forth certain methods for the public body to give notice including, in relevant part, 1) delivery to representatives of the news media who regularly report on sessions of the public body; 2) posting or depositing the notice at a convenient public location at or near the place of the session, if the public body has given public notice that this method will be used; or 3) any other reasonable method.¹⁵ A copy of the notice must be kept for at least one year after the date of the session.¹⁶

With respect to the minutes, the Act provides that after a public body meets in closed session, the minutes for its next open session shall include: 1) a statement of the time, place, and purpose of the closed session; 2) a record of the vote of each member as to closing the session; 3) a citation of the authority under the Act for closing the session; and 4) a list of the topics of discussion, persons present, and each action taken during the session.¹⁷ The Act further provides that the minutes and any tape recording of the closed session must be sealed and may not be open to

¹¹ Attachment C is a model Form of Statement for Closing a Meeting as recommended in the Open Meetings Act Manual. Section 10-508(d) further provides that if a person objects to the closing of a session, the public body shall send a copy of the written statement to the State Open Meetings Law Compliance Board ("Compliance Board"). The Compliance Board is authorized to, among other things, "receive, review, and resolve complaints from any person alleging a violation of the provisions of [the Open Meetings Act] and issue a written opinion as to whether a violation has occurred." § 10-502.4, Attachment B, p. B-4. The opinions of the Compliance Board are advisory only and the Compliance Board may not require or compel any actions by a public body. § 10-502.5(i), Attachment B, p. B-6.

¹² § 10-508(b), Attachment B, p. B-10.

¹³ § 10-508(c), Attachment B, p. B-10.

¹⁴ § 10-506(a) and (b), Attachment B, p. B-8.

¹⁵ § 10-506(c), Attachment B, p. B-8. The Act also provides for publication in the Maryland Register, if the public body is a unit of State government. § 10-506(c)(1).

¹⁶ § 10-506(d), Attachment B, p. B-8.

¹⁷ § 10-509(c)(2), Attachment B, p. B-10. This is the only information regarding the closed session that is required to be disclosed by the Act. Any other information regarding the closed session may only be disclosed if a majority of the Mayor and Council then present and voting vote in favor of disclosure, provided the information is not otherwise protected from disclosure by law.

public inspection except: 1) for a meeting closed to consider the investment of public funds (§ 10-508(a)(5)), when the public body invests the funds; 2) for a meeting closed to consider the marketing of public securities (§ 10-508(a)(6)), when the public securities being discussed have been marketed; or 3) on request of a person or on the public body's own initiative, if a majority of the members of the public body present and voting vote in favor of unsealing the minutes and any tape recording.¹⁸

III. Recommendation

In my opinion, the current method of noticing closed sessions on the Mayor and Council Agendas satisfies the noticing requirements of the Act. In addition, in order to be in compliance with the Act, closed sessions should only be held when:

- (1) the matter(s) to be discussed are expressly allowed under the provisions of § 10-508(a) of the Act;
- (2) a majority of the Mayor and Council present and voting have voted on the record to close the session;
- (3) the Mayor has made a written statement of the reasons for closing the meeting including a citation of the authority under the Act, and a listing of the topics to be discussed; and
- (4) the Mayor and Council includes the required information regarding the closed session in the minutes for its next open session.

While the vote of the Mayor and Council to go into closed session must be done in open session, the Open Meetings Act does not require that the vote be conducted on camera or in the Mayor and Council Chambers. The Mayor and Council may, however, choose to adopt procedures that would require that the motion to enter into closed session be conducted on camera during the course of its regularly scheduled meeting,¹⁹ except in exceptional circumstances.²⁰ This would provide increased access to the Mayor and Council's process (through cable and the internet) to those who cannot attend the meeting in person.

The Open Meetings Act also does not dictate when the closed session must be conducted (e.g., beginning, middle, or end of the regularly scheduled meeting). As such, the Mayor and Council is free to decide when, during the course of its regularly scheduled meetings, would be the best

¹⁸ § 10-509(c)(3) and (4), Attachment B, p. B-11.

¹⁹ The Mayor and Council may choose to continue its practice of holding closed sessions at 6 p.m., however, that would require convening the meeting on camera at 6 p.m., rather than 7 p.m., for purposes of going into closed session on camera.

²⁰ Exceptional circumstances would be determined on a case-by-case basis and may include situations in which the closed session may need to be conducted outside of the regularly scheduled Mayor and Council meetings. In those rare occasions, the Mayor and Council may not want to expend taxpayers' money to require the entire cable crew to report to work solely for the purpose of televising a vote to go into closed session.

time to conduct closed sessions. In making this decision, it is important for the Mayor and Council to consider 1) whether any citizens may be left waiting to attend a later scheduled item;²¹ 2) whether the closed session item is related to an open session item (in which case it may need to go before the open session item); and 3) whether a closed session item should go earlier in the evening to allow for sufficient time for resolution.

While the Mayor and Council may propose general guidelines to City staff on how closed session should be scheduled, I would not recommend adopting rigid rules dictating the process. Closed sessions, by their very nature, can become necessary on short notice and the ability to have some flexibility on how they are scheduled is essential to the effective administration of City business.

IV. Conclusion

Future closed sessions will be scheduled in accordance with the general guidance provided by the Mayor and Council.

²¹ On those occasions when a closed session may be scheduled in the beginning or middle of a meeting, citizens' schedules may be accommodated by indicating on the agenda a time when the meeting is expected to resume in open session.